89-1024

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CLARENCE E. SICKELSMITH,

PETITIONER

V.

EDWARD S. TOOLIS, JR., D.D.S.,

RESPONDENT

ON APPEAL FROM THE SEVENTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO SEVENTH APPELLATE DISTRICT

J. MICHAEL KAPP, J.D., LL.M.
KAPP LAW OFFICES
ATTORNEY FOR PETITIONER
128 West Fifth Street
P.O. Box 768
East Liverpool, Ohio 43920
Phone: 216-386-6026

Preliminary Matter

QUESTIONS PRESENTED

I. WAS PETITIONER DENIED THE EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE FAILURE OF THE COURTS OF OHIO TO EXTEND TO PETITIONER THE TOLLING PROVISIONS OF THE STATUTE OF LIMITATIONS FOR DENTAL MALPRACTICE?

II. WAS PETITIONER DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE FAILURE OF THE COURTS OF OHIO TO EXTEND TO THE PETITIONER THE TOLLING PROVISIONS OF THE STATUTE OF LIMITATIONS FOR DENTAL MALPRACTICE?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CLARENCE E. SICKELSMITH,

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PETITION FOR WRIT OF CERTIORARI - STATE CIVIL CASE

J. MICHAEL KAPP, J.D., LL.M.
KAPP LAW OFFICES
ATTORNEY FOR PETITIONER
128 West Fifth Street
P.O. Box 768
East Liverpool, Ohio 43920
Phone: 216-386-6026

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OPINIONS BELOW

The order of the Ohio Supreme Court entered August 2, 1989, dismissing the appeal sua sponte; the opinion of the Ohio Seventh Appellate District Court of Appeals of Columbiana County, entered on March 30, 1989; and the Court of Common Pleas of Columbiana County opinion of June 29, 1987, entered on July 21, 1987, are set out in the Appendix hereto.

Notice of Appeal from the Ohio Supreme Court to the United States Supreme Court was filed October 23, 1989, in the Ohio Supreme Court and in the Ohio Seventh Appellate District Court of Appeals of Columbiana County, being the Court having custody of the record.

This appeal is taken pursuant to 28 U.S.C. §1257(a).

JURISDICTION

This action is one of alleged dental malpractice which was dismissed under Ohio Revised Code §2305.11(A) as enacted effective 3/15/82, which lowered the statute of limitations on such cases from two years to one year by including them in the one-year medical malpractice provisions. However, the Ohio Supreme Court ruled on December 24, 1986, in Evans v. Chapman, 28 Ohio St. 3d 132, that the 180 day tolling provision of the statute (by which written notice to a Defendant within one year gave a Plaintiff an additional 180 days to file) did not apply to dental malpractice, even though, by such notice, the Plaintiff substantially complied with the purpose of such limitations statutes.

The statute was undeniably and patently vague as to the application of the 180 day tolling provision, yet the Court declined to

make its ruling merely prospective so as to give adequate notice to Plaintiffs. The Defendant-Respondent in this case admitted he also construed the statute so as to permit the tolling, and gave that as a basis for his late amendment to his answer raising the defense (See page 22 below). He also demanded in his original answer the statutory arbitration for medical claims, pursuant to a related statute, Ohio Revised Code §2711.21, further showing he believed medical and dental claims were to be treated similarly.

In addition, within 3 months of the Ohio Supreme Court's ruling, the Ohio legislature introduced an amendment to O.R.C. 2305.11(A), clarifying the statute so as to demonstrate that the tolling provision should apply to dental malpractice as well as medical malpractice.

The findings of Evans (Id.) were applied retroactively by Ohio Courts. (See Anello v. Hufziger, unreported, C-870584 (C.A. Hamilton, 1988) and Morley v. Jones, 24 Ohio App. 3d 112, 493 N.E. 2d 312 (1985).

As to the Plaintiff-Petitioner in the instant case, the original Judge at the Trial Court level overruled Respondent's Motion for Summary Judgment without comment as to whether the basis for the decision was interpretation of the statute, undue delay by the Respondent in raising the issue, or failure of the Respondent to properly request leave to file a Second Motion for Summary Judgment as required by Ohio Civil Procedure Rule 56.

Yet the Defendant-Respondent was granted the harsh remedy of dismissal of Petitioner's claim, with the second Judge at the Trial Court level failing even to rule on Petitioner's arguments as to waiver, undue delay and prejudice to Plaintiff (Appendix, page 35).

The Ohio Court of Appeals, in Edwards v. Ball (1st Dist. Hamilton Co., 10/15/86) No. C-850872 (Appendix page 77), found the statute unconstitutional as a violation of the Equal Protection provisions of the Ohio Constitution, holding there was "no rational basis" for treating dental and medical claims differently as to the tolling provisions, and finding the intent of the legislature clearly otherwise.

For these reasons and those found herein in the section "Substantiality of the Questions Presented", Appellant submits that both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States constitution were violated by the application of the holding in Evans (supra) to Petitioner.

The Ohio Supreme Court in Evans (supra), specifically found Ohio Revised Code §2305.11(A) as construed constitutional under the Ohio and United States Constitutions.

The jurisdiction of the U.S. Supreme Court to review this decision of the Ohio Supreme Court on appeal is conferred by 28 U.S.C. §1257(a).

To sum, the totality of the circumstances below and the actions of the state courts denied to Petitioner his federal constitutional rights to due process and equal protection of the laws, therefore, Petitioner asks the U.S. Supreme Court to rule on the validity of such proceedings; for Petitioner that his claim may be reinstituted; and for the numerous other claimants whose rights may be abrogated in similar situations.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. Ohio Revised Code §2305.11(A) [Time limitations for bringing certain actions; definitions] as effective 3/15/82 to 10/20/87 provides: "An action for...malpractice, including an action for malpractice against a physician, podiatrist, hospital or

dentist..., shall be brought within one year after the cause thereof accrued...".

"If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given."

The full text of the statute, as effective on 7/1/76, 3/15/82 and 10/20/87, is set out in full in the Appendix hereto at pages 55 - 68.

III. Ohio Revised Code §2711.21 [Arbitration Board to hear medical claim], as effective on 7/28/75 and 10/27/87, is set out in full in the Appendix hereto, at pages 65 - 68.

STATEMENT OF THE CASE

This action arose from alleged negligent dental treatment provided to the Plaintiff-Petitioner, Clarence Sickelsmith, on April 5, 1983, by the Defendant-Respondent, Edward S. Toolis, Jr., DDS. The parties shall hereinafter be referred to as Petitioner and Respondent. Respondent had pulled Petitioner's tooth, bringing with the tooth a section of jawbone, leaving a communication between Petitioner's mouth and sinus cavity. (Facts which Respondent, though denying malpractice or negligence, admitted in his answer).

On March 16, 1984, within one (1) year after the incident, Petitioner notified the Respondent that he was considering an action for "medical malpractice and negligence". Respondent received said notice the following day.

A Complaint alleging medical malpractice and negligence was filed on August 31, 1984,

within 180 days of the service of the written notice on the Respondent.

Respondent filed his Answer on October 1, 1984. Respondent's Answer was a general denial containing no affirmative defenses. Thereafter, and until February, 1985, discovery was conducted by both parties.

On or about February 7, 1985, Respondent filed a Motion for Summary Judgment asserting that there were no genuine issues as to any material fact and that he was subject to summary judgment as a matter of law. This Motion raised no statute of limitations issues and, in fact, was limited to the presentation of affidavits contending that the treatment rendered by the Respondent did not fall below the accepted standard of dental care.

After the presentation of a conflicting affidavit and a hearing on May 31, 1985, the Court overruled the Respondent's Motion and ordered the case submitted to arbitration

under the medical claims arbitration statute, O.R.C. 2711.21, as requested in Respondent's answer. Both parties then designated their respective arbitrators, as did the Court, the Honorable Judge Warren Bettis presiding.

On January 21, 1986, one (1) month prior to an already scheduled pretrial conference, counsel for the Respondent obtained an ex parte Leave to File an Amended Answer Instanter, giving no reasons for the delay, being 508 days after the complaint was filed and 348 days after Respondent's Motion for Summary Judgment on other grounds. This Amended Answer was the first and only pleading to raise the statute of limitations as an affirmative defense. As stated, Petitioner was given no opportunity prior to filing to oppose the Amended Answer. Ohio Civil Rule of Procedure 8(C) states, as does Rule 8 of the Federal rules, that "In pleading to a preceding pleading, a party

shall set forth affirmatively...statute of limitations...".

On or about February 28, 1986, counsel for Respondent filed a second Motion for Summary Judgment, based on the newly added affirmative defense of statute of limitations. Both parties filed Memoranda and on April 18, the Court overruled the Respondent's Motion without setting out the reasons therefore. (See Appendix page 34).

During the preparation and execution of the Judgment Entry, counsel for the parties discussed the options available to them, specifically, having the case scheduled for trial or submitting it to arbitration. As a result, counsel for both parties agreed to have the matter arbitrated under the medical claims arbitration statute O.R.C. 2711.21 (Appendix page 65). Also included in the agreement were the rights of a third party - Plaintiff, Crystal Sickelsmith, wife of Clarence.

Finally, on or about February 11, 1987, nine months after the agreement to submission to arbitration, and without leave of Court, Respondent filed an Application for Reconsideration of the previously overruled Motion for Summary Judgment. Petitioner filed a Memorandum in Opposition.

On June 29, 1987, a hearing was conducted by the Honorable Judge Douglas C. Jenkins, who had replaced Judge Bettis in the fall of 1986.

On December 24, 1986, the Ohio Supreme Court had ruled, in Evans v. Chapman, 28 Ohio St. 3d 132, N.E. 502 N.E. 2d 1012, that the 180 day tolling provision of O.R.C. §2305.11(A) did not apply to dental claims and that this was not a denial of equal protection of the laws. Based on that decision, and without comment on Petitioner's arguments that Respondent's Amended Answer was not timely and that Respondent had waived the issue by agreeing to arbitration under the

medical claims statute, Judge Jenkins granted Respondent's Motion and dismissed Petitioner's portion of the suit on July 21, 1987. The claim for loss of consortium by Plaintiff Crystal Sickelsmith is governed by a different statute of limitations and was continued and is currently set for arbitration.

Petitioner timely filed his Notice of Appeal to the Court of Appeals for the Seventh District of Ohio, which Court affirmed the decision of the Trial Court on March 30, 1989. The Opinion of the Court of Appeals is included in the Appendix at Page 39.

On August 2, 1989, the Supreme Court of Ohio ordered that Petitioner's appeal to that Court be dismissed without further hearing.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. WAS PETITIONER DENIED THE EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BY THE FAILURE OF THE COURTS OF OHIO TO EXTEND TO PETITIONER THE TOLLING PROVISIONS OF THE STATUTE OF LIMITATIONS FOR DENTAL MALPRACTICE?

A. PLAINTIFFS IN DENTAL MALPRACTICE CASES IN OHIO WERE TREATED DISSIMILARLY THAN PLAINTIFFS IN MEDICAL MALPRACTICE CASES, THEREBY TREATING DISSIMILARLY MEMBERS OF THE SAME CLASS WITHOUT RATIONAL BASIS.

B. PETITIONER WAS HELD TO A MUCH HIGHER STANDARD THAN RESPONDENT, WITHOUT RATIONAL BASIS.

A. The Supreme Court of Ohio construed O.R.C. 2305.11(A) to read such that, when the Statute of Limitations for dental malpractice was reduced from two years to one, it was included with medical malpractice with respect to the one-year and four-year time limitations, while simultaneously being excluded from the 180-day extension of the limit when a letter of notice was sent to a potential Defendant.

The purpose of such statutes of limitations is "to protect the defendant not only against fictitious claims, but also against the difficulty of obtaining evidence after lapse of time, even when he is confronted with a genuine one..." Prosser, Handbook of the Law of Torts, 4th Ed. (1971) at 144. By granting an extension of 180 days where the Defendant is notified of a possible claim within one year, the goal of the statute is fulfilled, yet the risk of forcing Plaintiff to file unnecessary lawsuits when time is too short to permit adequate preliminary investigation is obviated. Thus, the tolling also protects a certain number of defendants from being named publicly and incorrectly as a negligent practitioner.

In the instant case, Plaintiff-Petitioner complied with the above rationale by sending a notice letter within one year, enabling Respondent to gather and preserve

evidence in a timely fashion. Thus, no significant harm accrued to Respondent. Petitioner substantially complied with O.R.C. 2305.11(A).

As the Court of Appeals of Hamilton County, Ohio, held in Edwards v. Ball No. C-850872 (1986) (Unreported - see Appendix p. 83), the legislature could have had no rational basis for treating dentists and physicians alike with respect to those provisions constricting Plaintiffs but not as to the grace period protecting Plaintiffs acting in good faith. The Court held the statute unconstitutional under the Ohio Constitution as treating dissimilarly members of the same class, i.e. persons holding claims against medical-psychological treatment professionals.

Although the Ohio Supreme Court held in Evans v. Chapman, 28 Ohio St. 3d 132 (1986), that the statute was not unconstitutional under the Ohio and U.S. Constitutions,

Petitioner submits that decision is patently erroneous as applied to Petitioner.

First, the Ohio legislature must have agreed that no rational basis existed for partially distinguishing between dental and medical claims, as it acted promptly to enact corrective measures. (See Appendix p. 60, O.R.C. 2305.11 as introduced 3/17/87 and effective 10/20/87).

Differing treatment between groups that are similarly situated may pose an equal protection violation. "...A classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed 404 U.S. 71, 76 (1971); F.S. Royster Guano Co. v. Virginia 253 U.S. 412, 415 (1920).

"The Constitution does not require that things different in fact be treated in law as

though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated... The inescapable answer is that we must look beyond the clarification to the purpose of the law. A reasonable clarification is one which includes all persons who are similarly situated with respect to the purpose of the law..." Tussman and tenBrock, "The Equal Protection of the Laws,", 37 Calif. L. Rev. 341 (1949), Selected Essays 1938-62 (1963), 789.

B. As parties in a suit, Plaintiffs and Defendant should be held to similar standards. However, although the Courts held that Petitioner was bound by the harsh application of the one-year limit, Respondent was given literally no practical time restrictions and was permitted to repeatedly waive his defense without consequence.

Although Ohio R. Civ. Proced. 8(C) states in part, "...a party shall set forth

affirmatively... statute of limitations.", Respondent was permitted by ex parte order to file an Amended Answer 506 days after the Complaint was filed and one month before a previously scheduled pretrial conference and, after Respondent had already filed a Motion for Summary Judgment on other grounds. When his Second Motion for Summary Judgment (filed without leave) was overruled on April 18, 1986, Respondent was permitted to move for reconsideration on January 21, 1987, nine months after an agreed Judgment Entry, involving the rights of a third party, submitting the case to arbitration.

In his Memorandum in Opposition to Jurisdiction, Respondent stated to the Ohio Supreme Court that "It should be noted that the defense of the Statute of Limitations was not raised initially because the Supreme Court had not ruled on the question of the

"180 day" letter of notice and the Courts of Appeals' cases were in conflict.

Further, when Defendant became aware of the Court of Appeals opinions, even though they were conflicting, he did raise the defense."

Respondent has thus admitted that he did not ascertain the issue, demonstrating that the reading of the statute was vague so as to deny adequate notice to prospective plaintiffs, and that the logical construction of the statute permitted tolling.

The conflicting Court of Appeals opinions existed because other Defendants had timely raised the issue. Respondent is thus being permitted to retroactively take advantage of an issue he failed to timely raise.

Respondent should have to plead the defense early enough to avoid unnecessary expenditures of time and money by Petitioner and the Court.

Respondent's original Answer requested arbitration pursuant to O.R.C. 2711.21's medical arbitration provisions, further demonstrating his belief the intent of the legislature was to treat both medical and dental claims equally.

Certainly, by agreeing to submit to 2711.21 medical arbitration on May 9, 1986, while the Courts of Appeals were in conflict, Respondent entered into an agreed Judgment Entry which should have settled the issue, at least as to Respondent's right to reassert the same. (See Appendix p. 96). Nevertheless, in granting Respondent's third Motion for Summary Judgment, the trial ruled solely on the Evans decision, and not as to the issues of waiver, laches and undue delay (See Appendix, page 35).

II. WAS PETITIONER DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BY THE FAILURE OF THE COURTS OF OHIO TO EXTEND TO THE PETITIONER THE TOLLING PROVISIONS OF THE STATUTE OF LIMITATIONS FOR DENTAL MALPRACTICE?

A. THE STATUTE AS WRITTEN WAS SO VAGUE AS TO NOT ADEQUATELY NOTIFY PETITIONER OF THE NECESSARY PROCEDURE TO PRESERVE HIS RIGHT TO REDRESS.

B. THE COURTS OF OHIO FAILED TO CONSTRUE THE STATUTE IN SUCH MANNER AS TO PRESERVE THE INTENT OF THE LEGISLATURE.

C. BY APPLYING EVANS V. CHAPMAN TO CASES FILED PRIOR TO THAT DECISION, THE SUPREME COURT OF OHIO RETROACTIVELY APPLIED A STANDARD WHICH CUT OFF PETITIONER'S RIGHT TO REDRESS.

A. As outlined above, the statute was incontrovertibly vague. The Courts of Appeal of Ohio were in conflict, the Respondent in this case admitted he was not adequately aware of the issue so as to be able to raise it as a defense for over 16 months after the Complaint was filed, which incidentally was almost four years after the statute was effective (3/15/82).

B. That the construction given by the Ohio Supreme Court was not that intended by the legislature is readily apparent in the prompt correction of the statute after the Evans ruling. Petitioner should not be harshly punished by the error of the Court. In the instant case, as in Royster Guano Co. v. Virginia, (Supra), at 416, it is "Arbitrary in effect; and none the less because it is probable that [it] was due to inadvertence rather than design."

C. Due process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 425 U.S. 319, 334 (1976). Since the Respondent had notice of the claim within one year (the letter was sent March 16, 1984). Respondent would not be prejudiced by permitting tolling of the claim.

Failing to permit the Petitioner to proceed on the merits by applying Evans to

cases filed prior to the Ohio Supreme Court decision resolving the conflict has produced "substantial inequitable results" because retroactivity has deprived Petitioner of "any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." Chevron Oil Co. v. Hudson, 404 U.S. 97, 108 (1971). In Chevron, a United States Supreme Court decision which would have barred a personal injury claim filed before the decision was held to apply only prospectively so as not to unjustly deprive the Plaintiff of a remedy. The three factors for consideration, as expressed in Chevron at 106-7, are:

1. Is the decision one of first impression that was not clearly foreshadowed?

2. Will retrospective application retard the operation of the statute, considering its prior history, purpose and effect?

3. Will retrospective application produce substantial inequitable results ("injustice or hardship")?

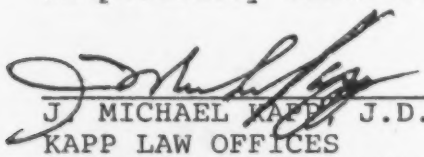
Applying those factors, Petitioner was denied due process. His case was filed more than 2 years before the Evans decision.

"The process is flexible and calls for such procedural protection as the particular situation demands."

CONCLUSION

Petitioner therefore requests that the Ohio Supreme Court be ordered to reverse the decision of the Seventh Appellate District of Columbiana and enter an order reinstituting Petitioner's claim for further hearing.

Respectfully submitted,



J. MICHAEL KAPP, J.D., LL.M.
KAPP LAW OFFICES
ATTORNEY FOR PETITIONER
128 West Fifth Street
P.O. Box 768
East Liverpool, Ohio 43920
Phone: 216-386-6026

PROOF OF SERVICE

I, J. Michael Kapp, Attorney for Clarence E. Sickelsmith, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of December, 1989, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the other party thereto, namely, Edward E. Toolis, Jr., D.D.S., by depositing a copy in a duly addressed envelope with First Class postage prepaid in a United States post office, located at 700 Dresden Avenue, East Liverpool, Ohio, to his attorney of record: Jerry O. Stephens; Roth, Stephens, Blair & Co., L.P.A.; 1000 Bank One Building; Youngstown, Ohio 44503.

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ON APPEAL FROM THE SEVENTH APPELLATE DISTRICT

APPENDIX

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KAPP LAW OFFICES
ATTORNEY FOR PETITIONER
128 West Fifth Street
P.O. Box 768
East Liverpool, Ohio 43920
Phone: 216-386-6026

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COLUMBIANA COUNTY COMMON PLEAS

J. WARREN BETTIS CASE NO. 84-CIV-1061

JURY CIVIL DOCKET

CLARENCE E. SICKELSMITH, ET. AL.

VS.

EDWARD S. TOOLIS, JR., D.D.S.

DATE OF ORDER: 4/18/86

Case assigned for hearing on Defendant's Motion for Summary Judgment. Counsel for both parties appeared. Motion argued. Motion OVERRULED. Costs taxed against the Defendant. See J.

IN THE COURT OF COMMON PLEAS

COLUMBIANA COUNTY, OHIO

CASE NO. 84-CIV-1061

CLARENCE E. SICKELSMITH, et al,)
)
PLAINTIFFS,)
)
-vs-)
)
EDWARD S. TOOLIS, JR., D.D.S.,) OPINION
)
DEFENDANT)

This matter came before the Court on Defendant's Motion for Reconsideration of its Motion for Summary Judgment, which had previously been overruled, asserting as a basis for said judgment that this dental malpractice claim had not been brought within the period set forth in the Statute of Limitations.

The Court, in previously overruling said motion, had relied on conflicting Court of Appeals decisions regarding the extension of the Statute of Limitation period, by sending a "180 day" letter. Since that

time, the Ohio Supreme Court in Evans v. Chapman, 28 Ohio St. 3d 132 (1986), indicated that the "180 day" letter is only applicable to medical malpractice cases.

Though a party in raising an argument on Statuce of Limitations should do so on a procedural basis under Civil Rule 12 rather than under Civil Rule 56, it would seem that the better weight of authority would still allow the Court to makes it decision on a summary judgment basis. Hanna v. U.S., 514 F. 2d 1092 (1975)

When this matter was previously before the Court on Summary Judgment, the pleadings, affidavits, interrogatories and depositions indicated that Defendant treated Plaintiff on 4-5-83, and that on 3-16-84 Plaintiffs' counsel sent Defendant a "180 day" letter and that suit was filed in this case on 8-3-84. There is no question that between the dates of 4-5-83 and 5-4-83

Plaintiff was at her attorney's office and had photos taken of the alleged malpractice dental work. Based on the Ohio Supreme Court's decision in Hoffman v. Davidson, 31 Ohio St. 3d 60, 31 O.B.R. @ 167 (1987), the fact of contact with the attorney verifies that the party was aware of the malpractice. Thus, on the facts before the Court previously at summary judgment in light of the decision in the Evans, Supra, Plaintiffs' action was not brought within the one-year Statute of Limitations applicable to this case.

Plaintiff argues that since the parties, by agreement among themselves and with subsequent order of the Court, submitted their case to arbitration, pursuant to Ohio Revised Code Section 2711.21, that the Court loses jurisdiction to dismiss this claim for violation of the Statute of Limitations. The Court finds said argument

to be totally without merit, in that the arbitration proceedings pursuant to such statute are limited in scope and do not devoid the Court of jurisdiction concerning procedural matters, and the Court may still decide the issues on a substantive basis, merely allowing the arbitration report to become a part of the evidence.

For the foregoing reasons, the Court does reconsider its previous decision and summary judgment is granted in favor of Defendant. Costs taxed against the Plaintiffs.

DOUGLAS C. JENKINS, JUDGE

DATED: June 29, 1987

STAMP FILED MAR. 30, 1989 IN THE
COURT OF APPEALS COLUMBIANA CO.,
OHIO, CARL L. STACEY, CLERK

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CLARENCE E. SICKELSMITH, ET AL.)

PLAINTIFFS-APPELLANTS) OPINION

-VS-)

EDWARD S. TOOLIS, JR., D.D.S.,) CASE NO.

DEFENDANT-APPELLEE) 87-C-32

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Common Pleas
Court, Case No. 84-CIV-1061

JUDGMENT: Affirmed

APPEARANCES

For Plaintiffs-Appellants:

J. Michael Kapp
Timothy R. Brookes
128 W. Fifth St.
East Liverpool, Ohio 43920

For Defendant-Appellee:

Jerry O. Stephens

1000 Bank One Bldg.

Youngstown, Ohio 44503

Hon. Joseph E. O'Neill,

Hon. Joseph Donofrio,

Hon. Edward A. Cox, JJ.

Dated: March 30, 1989

COX, J.

This is a properly perfected appeal from a ruling of the Columbiana County Common Pleas Court granting summary judgment in defendant-appellee's favor.

This action arose from alleged negligent dental treatment provided to the plaintiff-appellant, Clarence Sickelsmith, on April 5, 1983, by the defendant-appellee, Edward S. Toolis, Jr., D.D.S. On March 16, 1984, within one year after the incident, appellant notified appellee he was considering an action for "medical malpractice and negligence." Appellee received this

notice the following day. Appellant filed a complaint alleging malpractice and negligence on August 31, 1984. Appellee filed his answer on October 1, 1984. Appellee's answer was a general denial which contained no affirmative defenses. Thereafter, discovery was conducted until February of 1985. On or about February 7, 1985, appellee filed a motion for summary judgment. The motion did not raise any statute of limitations issues and, in fact, was limited to the presentation of affidavits contending that the treatment rendered by the appellee did not fall below the accepted standard of dental care.

After the presentation of a conflicting affidavit and a hearing on May 31, 1985, the court overruled the appellee's motion and ordered that the case should be submitted to arbitration. Both parties then designated their respective arbitrators, as did the court, the Hon. Warren Bettis, Judge,

presiding. On January 21, 1986, counsel for the appellee obtained a leave to file an amended answer instanter. This amended answer was the first pleading to raise the statute of limitations as an affirmative defense. On February 28, 1986, appellee's counsel filed a second motion for summary judgment, based on the newly added affirmative defense of the statute of limitations. The court again overruled the appellee's motion. After some discussion, the case was again submitted to arbitration pursuant to R.C. 2711.21.

On February 11, 1987, appellee filed an application for reconsideration of the previously overruled motion for summary judgment. A hearing was conducted before the Hon. Douglas C. Jenkins. On June 29, 1987, Judge Jenkins issued a written opinion granting appellee's motion as to appellant's claim. On July 21, 1987, the trial court

dismissed appellant's cause of action. This appeal followed.

Appellant's first assignment of error is as follows:

"The Court of Common Pleas erred in permitting appellee to raise an affirmative defense instanter by amendment more than sixteen (16) months after the filing of the complaint."

Appellant first argues that the affirmative defense of statute of limitations must be affirmatively pled. Civ. R. 12 is very clear on this matter, and appellant is quite correct. However, the question is whether the trial court properly granted leave to amend the answer to include that defense. Under its first assignment of error, appellant offers no law suggesting that such leave was improper in this case, but instead reserves such citations for its third assignment of error.

Appellant's second assignment of error is:

"The appellee, by voluntarily agreeing to proceed with medical arbitration pursuant to O.R.C. 2711.21, waived his right to re-assert his previous motion for summary judgment."

This case was submitted into arbitration pursuant to R.C. 2711.21(A) which reads as follows:

"(A) Upon the filing of any medical, dental, optometric, or chiropractic claim as defined in division (D) of Sec. 2305.11 of the Revised Code, if all of the parties to the medical, dental, optometric, or chiropractic claim agree to submit it to nonbinding arbitration, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court. * * *."

Appellant cites case law supporting the propositions that (1) submission of a matter into arbitration is grounds for discontinuance of a suit; The Columbus, Hocking Valley Toledo Ry. Co. et al v. Burke et al (1896), 54 Ohio St. 98; Bradstreet v. Pross 9 (1884) Ohio Dec. Rep. 154, affg. 8 Ohio Dec. Rep. 731; (2) that the consent to binding arbitration is a valid waiver to the right of appeal in the trial court; Ruper v. Smith (1983), 12 Ohio App. 3d 44; and (3) that a motion to dismiss is not available when a matter has been referred to arbitration under R.C. 2711; Smith v. Dugan & Meyer Const. Co. (1984), 18 Ohio Misc. 2d 5.

These cases are to be distinguished from the instant case, since they involve binding arbitration by contract before the cause of action arose or situations where the parties agreed to binding arbitration, and the arbitrators rendered a decision. These cases are inapplicable because in the

instant case there was no contractual arbitration clause preceding the cause of action. R.C. 2711.21(A) provides expressly for nonbinding arbitration with right to appeal de novo. Additionally, since this case has not yet been arbitrated, appellant's second assignment of error is without merit.

Appellant's third assignment of error is as follows:

"The Court of Common Pleas erred in failing to rule that appellee, by his conduct, waived the right to raise the statute of limitations as a defense."

Appellant has failed to demonstrate that he has been placed in a different position regarding the statute of limitations defense because of the appellee's delay.

Appellant originally attempted to circumvent the one-year statute of limitations for dental malpractice cases by using

the 180 day "written notice" pursuant to R.C. 2305.11. The relevant portions of that statute are these:

> "(A) An action for * * * malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist * * * shall be brought within one year after the cause thereof accrued * * *.
>
> "If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at that time within one hundred eighty days after that notice is given.
>
> "* * *

"(D) As used in this section:

"* * *

"(2) 'Physician' means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

"(3) 'Medical Claim' means any claim asserted in any civil action against a physician, podiatrist or hospital arising out of the diagnosis, care, or treatment of any person.

"* * *

"(5) 'Dentist' means all persons licensed to practice dentistry by the state dental board.

"(6) 'Dental Claim' means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person."

When this statute was enacted, it clearly differentiated between medical and

dental claims. It was not interpreted as such, however, until the case of Evans v. Chapman (1986), 28 Ohio St. 3d 132. Appellant attempts to argue that by allowing appellee to wait until this interpretive decision was published, this delay operated to appellant's prejudice. However, Evans, supra did not create new law, it merely interpreted law that was in effect when the cause of action originally accrued. When the action was originally filed, the statute of limitations had run.

The judgment of the trial court granting summary judgment for appellee is affirmed.

O'Neill, P.J. concurs.

Donofrio, J., concurs.

APPROVED:

S/S Edward A. Cox

EDWARD A. COX, JUDGE

IN THE COURT OF APPEALS OF OHIO

SEVENTH DISTRICT

STATE OF OHIO)

)

COLUMBIANA COUNTY) SS:

CLARENCE E. SICKELSMITH, ET AL,) JOURNAL

PLAINTIFFS-APPELLANTS,) ENTRY

- VS -)

EDWARD S. TOOLIS, JR., D.D.S.,) CASE NO.

DEFENDANT-APPELLEE.) 87-C-32

For the reasons stated in the opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Common Pleas Court of Columbiana County, Ohio, is affirmed. Costs to be taxed against appellants.

S/S JOSEPH E. O'NEILL

S/S JOSEPH DONOFRIO

S/S EDWARD A. COX

JUDGES.

THE SUPREME COURT OF OHIO

1989 TERM To wit: August 2, 1989

Clarence E. Sickelsmith et al.,:

Appellants, : Case No.

v. : 89-894

Edward S. Toolis, Jr., D.D.S., : E N T R Y

Appellee. :

Upon consideration of the motion for an order directing the Court of Appeals for Columbiana County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Kapp Law Offices.

(Court of Appeals No. 87C32)

S/S THOMAS J. MOYER

THOMAS J. MOYER; Chief Justice

STAMPED FILED IN COURT OF APPEALS COLUMBIANA CO., OHIO CARL L. STACEY, CLERK OCT. 24, 1989

STAMPED FILED SUPREME COURT OF OHIO MARCIA J. MENGEL, CLERK, OCT. 23, 1989

IN THE SUPREME COURT OF THE STATE OF OHIO

CLARENCE E. SICKELSMITH	) CASE NO. 89-894
APPELLANT	) OHIO SUPREME COURT
VS.	) CASE NO. 87-C-32
EDWARD E. TOOLIS, JR., D.D.S.	) SEVENTH APPELLATE) DISTRICT COURT OF
APPELLEE	) APPEALS FOR) COLUMBIANA COUNTY

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CLARENCE E. SICKELSMITH, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order dismissing sua sponte an appeal from the Court of Appeals for Columbiana County which was entered herein on August 2, 1989.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

S/S J. MICHAEL KAPP
J. MICHAEL KAPP, J.D., LL.M.
KAPP LAW OFFICES
ATTORNEY FOR APPELLANT
128 West Fifth Street
P.O. Box 768
East Liverpool, Ohio 43920
Phone: 216-386-6026

PROOF OF SERVICE

I, J. Michael Kapp, Attorney for Clarence E. Sickelsmith, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of October, 1989, I served three (3) copies of the foregoing Notice of Appeal on the other party thereto, namely, Edward E. Toolis, Jr., D.D.S., by depositing a copy in a duly addressed envelope with First Class postage prepaid in a United States post office, located at 700 Dresden

Avenue, East Liverpool, Ohio, to his attorney of record: Jerry O. Stephens; Roth, Stephens, Blair & Co., L.P.A.; 1000 Bank One Building; Youngstown, Ohio 44503.

S/S J. MICHAEL KAPP
J. MICHAEL KAPP, J.D., LL.M.
KAPP LAW OFFICES
ATTORNEY FOR APPELLANT

§2305.11 [Time limitations for bringing certain actions; definitions.] Effective 7/1/76

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, than an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an

action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2910.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does no include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medial board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

OHIO REVISED CODE §2305.11. Effective 3/15/82

(A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, ~~or a~~ hospital, OR DENTIST, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.

If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital OR A DENTAL CLAIM AGAINST A DENTIST be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, ~~or~~ hospital, OR DENTIST apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until

his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation whose which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) "Physician" means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

(4) "Podiatrist" means all persons who are licensed to practice podiatric medicine and surgery by the state medical board.

(5) "DENTIST" MEANS ALL PERSONS LICENSED TO PRACTICE DENTISTRY BY THE STATE DENTAL BOARD.

(6) "DENTAL CLAIM" MEANS ANY CLAIM ASSERTED IN ANY CIVIL ACTION AGAINST A DENTIST ARISING OUT OF A DENTAL OPERATION OR THE DENTAL DIAGNOSIS, CARE, OR TREATMENT OF ANY PERSON.

§2305.11. Time limitations for bringing certain actions; definitions. Effective 10/20/87

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the non-payment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B)(1) Subject to division (B)(2) of this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the action accrued, except that, if prior to the expiration of that one-year period, a claimant who allegedly possesses a medical, dental, optometric, or chiropractic claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within one hundred eight days after the notice is so given.

(2) Except as to persons within the age of minority, of unsound mind, or imprisoned, as provided by section 2305.16 of the Revised Code:

(a) In no event shall any action upon a medical, dental, optometric, or chiropractic

claim be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim.

(b) If an action upon a medical, dental, optometric, or chiropractic claim is not commenced within four years after the occurrence of the act or omission constituting the alleged basis of the medical, dental, optometric, or chiropractic claim, then, notwithstanding the time when the action is determined to accrue under division (B)(1) of this section, any action upon that claim is barred.

(C) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code shall be commenced within one year after the abortion.

(D) As used in this section:

(1) "Hospital" includes any person, corporation, association, board, or authority that is responsible for the operation of any hospital licensed or registered in the state, including, but not limited to, those which are owned or operated by the state, political subdivisions, any person, any corporation, or any combination thereof. "Hospital" also includes any person, corporation, association, board, entity, or authority that is responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care, and treatment to individuals. "Hospital" does not include any hospital operated by the govern-

ment of the United States or any of its branches.

(2) "Physician" means any person who is licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, or hospital, against any employee or agent of a physician, podiatrist, or hospital, or against a registered nurse or physical therapist, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person.

(4) "Podiatrist" means any person who is licensed to practice podiatric medicine and surgery by the state medical board.

(5) "Dentist" means any person who is licensed to practice dentistry by the state dental board.

(6) "Dental claim" means any claim that is asserted in any civil action against a dentist, or against any employee or agent of a dentist, and that arises out of a dental operation or the dental diagnosis, care, or treatment of any person. "Dental claim" includes derivative claims for relief that arise from a dental operation or the dental diagnosis, care, or treatment of a person.

(7) "Derivative claims for relief" include, but are not limited to, claims of a parent, guardian, custodian, or spouse of an individual who was the subject of any medical

diagnosis, care, or treatment, dental diagnosis, care, or treatment, dental operation, optometric diagnosis, care, or treatment, or chiropractic diagnosis, care, or treatment, that arise from that diagnosis, care, treatment, or operation, and that seek the recovery of damages for any of the following:

(a) Loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, or any other intangible loss that was sustained by the parent, guardian, custodian, or spouse;

(b) Expenditures of the parent, guardian, custodian, or spouse for medical, dental, optometric, or chiropractic care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations provided to the individual who was the subject of the medical diagnosis, care, or treatment, the dental diagnosis, care, or treatment, the dental operation, the optometric diagnosis, care, or treatment, or the chiropractic diagnosis, care, or treatment.

(8) "Registered nurse" means any person who is licensed to practice nursing as a registered nurse by the state board of nursing education and nurse registration.

(9) "Chiropractic claim" means any claim that is asserted in any civil action against a chiropractor, or against any employee or agent of a chiropractor, and that arises out of the chiropractic diagnosis, care, or treatment of any person. "Chiropractic claim" includes derivative claims for relief that arise from the chiropractic diagnosis, care, or treatment of a person.

(10) "Chiropractor" means any person who is licensed to practice chiropractic by the chiropractic examining board.

(11) "Optometric claim" means any claim that is asserted in any civil action against an optometrist, or against any employee or agent of an optometrist, and that arises out of the optometric diagnosis, care, or treatment of any person. "Optometric claim" includes derivative claims for relief that arise from the optometric diagnosis, care, or treatment of a person.

(12) "Optometrist" means any person licensed to practice optometry by the state board of optometry.

(13) "Physical therapist" means any person who is licensed to practice physical therapy by the physical therapy section of the Ohio occupational therapy and physical therapy board.

§2711.21 [Arbitration board to hear medical claim.] Effective 7/28/75

(A) Upon the filing of any medical claim as defined in division (D)(3) of section 2305.11 of the Revised Code, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court. The arbitration board shall consist of one person designated by the plaintiff or plaintiffs, one person designated by the defendant or defendants, and a person designated by the court. The person designated by the court shall serve as the chairman of the board. Each member of the board shall receive a reasonable compensation based on the extent and duration of actual service rendered, and paid in equal proportions by the parties in interest. In a claim accompanied by a poverty affidavit, the cost of the arbitration shall be borne by the court.

(B) The arbitration proceedings shall be conducted in accordance with sections 2711.06 to 2711.16 of the Revised Code insofar as they are applicable. Such proceedings shall be conducted in the county in which the trial is to be held.

(C) If the decision of the arbitration board is not accepted by all parties thereto, the pleadings shall be amended to aver both both the fact that the controversy was submitted to an arbitration board and the decision of the arbitration board. The decision of the arbitration board, and any dissenting opinion written by any board member, shall be admitted into evidence at trial upon the offer of any party, if the court conducts a review of the arbitration decision and any other relevant information submitted by the parties and concludes that:

(1) The findings of fact by the arbitration board were not clearly erroneous;

(2) The decision is in accordance with applicable law;

(3) The Procedures required for conducting the hearing and rendering the decision were followed fairly and properly without prejudice to either party.

(D) Any party who has not made the offer stated in division (C) of this section may subpoena any member or members of the arbitration board for purposes of cross-examination.

(E) Nothing in this section shall be construed to limit the right of any person to enter into an agreement to arbitrate a controversy underlying a medical claim or to be bound by the decision of the arbitrators.

§2711.21 Arbitration of medical, dental, optometric or chiropractic claims.
Effective 10/20/87

(A) Upon the filing of any medical, dental, optometric, or chiropractic claim as defined in division (D) of section 2305.11 of the Revised Code, if all of the parties to the medical, dental, optometric, or chiropractic claim agree to submit it to nonbinding arbitration, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court. The arbitration board shall consist of one person designated by the plaintiff or plaintiffs, one person designated by the defendant or defendants, and a person designated by the court. The person designated by the court shall serve as the chairman of the board. Each member of the board shall receive a reasonable compensation based on the extent and duration of actual service rendered, and shall be paid in equal proportions by the parties in interest. In a claim accompanied by a poverty affidavit, the cost of the arbitration shall be borne by the court.

(B) The arbitration proceedings shall be conducted in accordance with sections 2711.06 to 2711.16 of the Revised Code insofar as they are applicable. Such proceedings shall be conducted in the county in which the trial is to be held.

(C) If the decision of the arbitration board is not accepted by all parties to the medical, dental, optometric, or chiropractic claim, the claim shall proceed as if it had not been submitted to nonbinding arbitration pursuant to this section. The decision of the arbitration board and any dissenting

opinion written by any board member are not admissible into evidence at the trial.

Nothing in this section shall be construed to limit the right of any person to enter into an agreement to submit a controversy underlying a medical, dental, optometric, or chiropractic claim to binding arbitration.

SUPREME COURT, JANUARY TERM, 1986

[28 Ohio St. 3d]

Opinion, per Holmes, J.

EVANS, APPELLANT, v. CHAPMAN, APPELLEE.

[Cite as Evans v. Chapman (1986), 28 Ohio St. 3d 132.]

Statute of limitations--Malpractice--One-hundred-eighty-day "written notice" provision of R.C. 2305.11(A) not applicable to claims against dentists--Equal Protection Clause not violated by operation of "written notice" provision.

O. Jur 3d Malpractice §66, 72.

The "written notice" provision of R.C. 2305.11(A), which creates a mechanism for extending the statute of limitations by one hundred eighty days, applies only to malpractice claims against physicians, podiatrist, or hospitals, not to malpractice claims against dentists.

The operation of the "written notice" provision contained in R.C. 2305.11(A),

as it applies to a dental malpractice claim, is not a denial of the equal protection of the laws.

(No. 86-501—Decided December 24, 1986.)

APPEAL from the Court of Appeals for Summit County.

This appeal specifically involves R.C. 2305.11, and its "written notice" provision, as they relate to an individual's dental malpractice claim. The material facts surrounding this case are not in dispute. Appellee, Ira S. Chapman, D.D.S., is licensed to practice dentistry in the state of Ohio. Appellant, Verna Evans, began a dentist-patient relationship with the appellee in 1946 and terminated such relationship in June 1982. Prior to terminating this relationship, and again in September 1982, appellant sought dental treatment at other dentists' offices. On June 2, 1983, appellant sent a letter to

appellee, advising him that she was contemplating legal action against him. Appellant's malpractice complaint was filed on December 1, 1983, and appellee was granted leave to file and answer on February 1, 1984. The trial court overruled appellant's motions to strike and for default judgment but granted appellee's motion for summary judgment. The court of appeals affirmed the trial court in every respect, on the basis that the notice provision applies to medical, not dental, malpractice claims.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Teodosio, Cherpas & Manos, George D. Mallo and Christopher T. Cherpas, for appellant.

Buckingham, Doolittle & Burroughs, Charles E. Pierson and Hamilton DeSaussure, Jr., for appellee.

HOLMES, J. The two basic issues presented are whether the "written notice" provision of R.C. 2305.11(A) applies to dental claims and, if not, whether such application would violate equal protection rights of individuals with dental claims. For the reasons which follow, we hold that the "written notice" provision of R.C. 2305.11(A) does not apply to dental claims and that this application does not deny equal protection of the laws.

Prior to 1982, dental malpractice claims were governed by the two-year statute of limitations for general negligence contained in R.C. 2305.10. Whitt v. Columbus Cooperative (1980), 64 Ohio St. 2d 355, 358 [18 O. O. 3d 512]. Effective March 15, 1982, R.C. 2305.11 was amended to add dental claims to those claims governed by its one-year statute of limitations. (139 Ohio Laws, Part I, 2153.) R.C. 2305.11 provided, in pertinent part:

"(A) An action for * * * malpractice, including an action for malpractice against a physician, podiatrist, hospital, or dentist * * * shall be brought within one year after the cause thereof accrued * * *.

"If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

"* * *

"(D) As used in this section:

"* * *

"(2) 'Physician' means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

"(3) 'Medical claim' means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person.

"* * *

"(5) 'Dentist' means all persons licensed to practice dentistry by the state dental board.

"(6) 'Dental claim' means any claim asserted in any civil action against a dentist arising out of a dental operation or the dental diagnosis, care, or treatment of any person." (Emphasis added.)

Under these statutory definitions, appellant's claim is a "[d]ental claim" as a matter of law and, by the plain words of this statute, the "written notice" provision of R.C. 2305.11(A) does not apply to such claims. The "written notice" provision clearly applies only to "[m]edical

claim[s]," and not to "[d]ental claim[s]" which are given separate statutory definitions. Appellant contends that there is no reason to find that a dental claim is not a medical claim, but the statute clearly distinguishes between the two types of claims.

If the legislature had intended to include dental claims within the scope of the "written notice" provision, which would have the effect of extending the statute of limitations period as to them, it would have done so. See Whitt v. Columbus Cooperative, supra.

Appellant next argues that dental claimants and medical claimants are similarly situated people of the same class so that a one- hundred-eight-day extension to one but not to the other is a denial of equal protection of the laws. This argument ignores the traditional distinction between these two groups of litigants. The common-

law concept of "malpractice" dealt solely with the legal and medical professions-that is why dental claims were previously governed by the statute of limitations for general negligence actions until R.C. 2305.11 was amended to specifically add dental claims to its one-year statute of limitations for malpractice. See Hocking Conservancy Dist. v. Dodson-Lindblom Assoc. (1980), 62 Ohio St. 2d 195 [16 O. O. 3d 217], and Morley v. E.B. Jones, D.D.S., Inc. (1985), 24 Ohio App. 3d 112, 115. If we were to take appellant's arguments to their natural conclusion, all other health care professional, e.g., chiropractors, or veterinarians, would be governed by R.C. 2305.11 simply because they also use the title "Dr." and have become specialists, even though their differing professions are not specifically listed in the statute.

Appellant also argues that this case involves not only differing treatment but

also a fundamental right, i.e., "her day in court," if the "written notice" provision is held inapplicable to her dental claim. However, all that is at stake here is a mechanism which, if used, would allow extension of the applicable statute of limitations; clearly, there is no fundamental right to an additional one hundred eight days in which to bring suit. The statute, then, "* * * 'must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.'" Schwan v. Riverside Methodist Hospital (1983), 6 Ohio St. 3d 300, 301, quoting Denicola v. Providence Hospital (1979), 57 Ohio St. 2d 115, 119 [11 O.O.3d 290] (differing requirements pertaining to expert testimony for "medical claims" and "dental claims" are constitutional).

Although differing treatment between groups that are similarly situated may pose

an equal protection problem, Massachusetts Bd. of Retirement v. Murgia (1976), 427 U.S. 307, differing treatment among differing persons does not necessarily suggest a violation of equal protection rights. Even so, " * * * [a] classification 'must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" Reed v. Reed (1971), 404 U.S. 71, 76.

In Denicola v. Providence Hospital, supra, we held that rational grounds exist for distinguishing between claims made against physicians and those against dentists as the Medical Malpractice Act was emergency legislation aimed at easing the growing burdens of medical malpractice. The General Assembly stated its specific concerns in this "malpractice crisis" as being

claims against physicians, podiatrists, or hospitals. R.C. 2305.11(D)(3). It may well be that the legislature found that claims against physicians, podiatrists or hospitals require additional time for the injured party to determine the cause and extent of the injury, whereas dental claimants can determine the cause and extent of their injuries within the one-year statute of limitations because they know the anatomical focus of their injuries. In any event, it is unlikely that dental claimants would claim their equal protection rights are violated when only the medical claimants are subject to special pleading requirements under R.C. 2307.42, a $200,000 limitation on general damages under R.C. 2307.43, mandatory malpractice, arbitration under R.C. 2711.21, and special restrictions on medical malpractice expert testimony under R.C. 2743.43. It may well be that the General

Assembly granted medical claimants the mechanism for extending the statute of limitations as a quid pro quo for all these additional restrictions applicable to them.

These rational bases, stated above, must be presumed to exist because " * * * [s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory determination will not be set aside if any state of facts reasonably may be conceived to justify it." McDowan v. Maryland (1961), 366 U.S. 420, 425-426 [17 O.O.2d 151, 280, 343]. Additionally, appellant has failed to show that R.C. 2305.11(A) was drafted "because of and not in spite of" the alleged disparate impact between medical and dental claimants. See Personnel Admr. of Mass. v. Feeney (1979), 442 U.S. 256. In conclusion, we hold that application of the "written

notice" provision contained in R.C. 2305.11(A) to medical claims but not to dental claims is not a denial of equal protection of the laws under Section 2, Article I of the Ohio Constitution or the Fourteenth Amendment to the United States Constitution.

Appellant raises one final issue, i.e. the propriety of the trial court's granting appellee's motion to file his answer brief instanter (over thirty days late). Civ. R. 6(B) provides, in pertinent part: "When * * * an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure of the act was the result of excusable neglect * * *."

Although it would be preferable to have an affidavit supporting appellee's allega-

tion that "clerical errors" had prevented the complaint from being transmitted to counsel, we cannot say the trial court abused its discretion under Civ. R. 6(B) in granting appellee's motion to file instanter, especially in light of the fact that no default motion was pending at the time. Cf. Miller v. Lint (1980), 62 Ohio St. 2d 209, 214 [16 O.O. 3d 244], where this court found the trial court abused its discretion in allowing the filing of an untimely answer when no Civ. R. 6(B) motion setting forth excusable neglect had been filed. The trial court had discretion under Civ. R. 6 to find that "clerical errors" constituted excusable neglect.

CUMA S. EDWARDS, Plaintiff-Appellant,

A

MARK S. EDWARDS, Plaintiff,

V.

EDWARD L. BALL, JR., D.D.S. and

DON M. BALL, D.D.S.,

Defendants-Appellees

No. C-850872

COURT OF APPEALS OF OHIO,

HAMILTON COUNTY

OCT. 15, 1986

OPINION

Civil Appeal from Court of Common Pleas

Strauss, Troy and Ruehlmann Co., L.P.A.,

Charles G. Atkins, of counsel, Cincinnati,

for plaintiff-appellant Cuma S. Edwards

Lindhorst & Dreidame, Nancy R. Neubauer,

Cincinnati, for defendants-appellees.

DOAN, Judge.

Defendants-Appellees Edward L. Ball, Jr. and

Don M. Ball (appellees) treated plaintiff-

appellant Cuma S. Edwards (appellant) for approximately June of 1978 until November 16, 1982 when their dentist-patient relationship terminated. Appellant underwent subsequent oral surgery and dental treatment. Appellant filed a malpractice suit against appellees, alleging that the appellees negligently cared for her and caused her injury. The suit was filed on May 11, 1984.

Appellees filed a motion for summary judgment to which appellant responded with a memorandum in opposition. Appellees contended that the suite had not been timely filed in accordance with R.C. 2305.11(A). Appellant argued that the 180-day extension period contained in that statute also applied to claims against dentists, and that the suit was timely filed. The trial court granted the appellees' motion in a judgment entered December 3, 1985. The court found

that the 180-day extension period did not apply to dentists. From this entry the appellant timely appealed.

The single assignment of error alleges the trial court erred in granting the motion for summary judgment on the basis that the 180-day extension does not apply to dental claims. We find the assignment of error well taken.

The appellant advances the thesis that to interpret R.C. 2305.11(A) (FN1) as the trial court did would create a distinction without a rational basis among members of a class in violation of the Equal Protection Clause of the Ohio Constitution. (FN2) The rule is well settled that legislation must apply alike to members of a given class, and that reasonable grounds must exist for distinguishing between those within and those without the class. Schwan v. Riverside Methodist Hospital (1983), 6

Ohio St. 3d 300, 302, 452 N.E. 2d 1337, 1339. It is also well established that where language of a statute permits, the statute will be construed so as to give it a constitutional interpretation. Whitmore v. The Indus. Comm. of Ohio (1922), 105 Ohio St. 295 302, 136 N.E. 910, 912. Where doubt exists as to the legislature's method of classification, the doubt must be resolved in favor of the legislation. City of Cleveland v. Davis (1916), 95 Ohio St. 52, 57, 115 N.E. 503, 505. The validity of a statute is presumed. Clifford v. Daugherty (1980), 62 Ohio St. 2d 414, 418, 406 N.E. 2d 517, 520. If a statute does not affect a fundamental interest or a suspect classification, then the statute must be upheld if there exists any conceivable set of facts under which the statute rationally furthers a legitimate governmental interest. Fort Hamilton- Hughes Memorial Hospital

Center v. Southard (1984), 12 Ohio St. 3d 263, 265, 466 N.E. 2d 903, 906. R.C. 2305.11 regulates the time for bringing causes of action which are either medical claims or dental claims. Medical claims are defined as civil claims asserted against physicians, podiatrists, or hospitals arising from the diagnosis, care, or treatment of any person. R.C. 2305.11(D)(3). Dental diagnosis, care, or treatment of any person. R.C. 2305.11 (D) (3). Dental claims are civil claims against dentists also arising from a dental operation or the dental diagnosis, care, or treatment of any person R.C. 2305.11(D)(6). The statute also defines the terms "physician" and "dentist". The legislatures designed R.C. 2305.11 to prevent stale claims, and to address the large number of malpractice claims asserted against various professionals. R.C. 2305.11(A) limits to one year the time for

bringing an action for malpractice against a physician, podiatrist, hospital, or dentist. R.C. 2305.11(B) is a statute of repose which disallows medical claims or dental claims brought more than four years after the act or omission constituting the alleged malpractice occurred. These two subsections are consonant with each other. However, the problem in the case at bar results from the apparent internal inconsistency of R.C. 2305.11(A).

In that particular subsection, the legislature treats malpractice actions against dentists and physicians alike in the first paragraph by requiring that both kinds of actions be brought within one year of accrual. In the second paragraph of R.C. 2305.11(A), the legislature creates a window period of 180 additional days by which a person with a medical claim may extend the limitation period simply by

giving written notice before time expires to the person against whom suit is being considered. Yet, the legislature did not expressly grant this same extension to persons with dental claims. In strictly construing this paragraph, the appellees argue, and the trial court agreed, that persons with dental claims could not avail themselves of the 180-day extension. The trial court and the appellees conceded that if the extension did apply to dental claims, then the appellant's claim was timely filed.

The trial court's construction of the second paragraph yields the result of attributing to the legislature an intent to distinguish dentists from physicians only for the purpose of applying the 180-day extension. In all other time applications contained in R.C. 2305.11, the legislature treated dentists and physicians alike. The trial court gave no reasons as to why the

legislature might have treated dentists and physicians differently only in that paragraph. The court focused only on the rote language of the statute without regard to the context in which it appeared. That focus was too narrow. Courts must consider not only the particular words but also tne intent of the entire legislation. Richter v. Anderson (1937), 56 Ohio App. 291, 295, 10 N.E. 2d 789, 791.

As previously noted, the trial court gave no reasons for distinguishing between dentists and physicians in this regard. Counsel for the appellees advanced three explanations at oral argument. First, perhaps the dentists had a strong lobby. Second, Rule 601(D) of the Rules of Evidence implies that qualification under Rule 702 is required only of persons who will testify in civil actions against physicians. Actions against dentists are not mentioned in Rule

601(D). Thus, the legislature recognized that because expert qualification is not necessary in dental claims, less time is needed to prepare an action against a dentist, and therefore the 180-day extension was not necessary for dental claims. Last, the legislature had a rational basis to draft the statute the statute as it did. Counsel argued that the plain meaning of the statute dictated the trial court's result. The argument concludes that the statute was constitutional, and the trial court reached the proper result.

We find these reasons unpersuasive. Dentists and physicians are, generically, medical- physiological treatment professionals cut from the same whole cloth. Dentists and physicians hold doctoral degrees in medical arts. Both are able to prescribe medication, perform surgery, give anesthesia, and generally to treat disease

of the body. Many of the principles of each discipline overlap. Persons with either dental or medical claims hold fungible claims. The legislature could have no rational basis for equating dentists and physicians in R.C. 2305.11(A) and (B) with respect to the one-year and four-year time limitations and in the same breath distinguishing between dentists and physicians in applying the 180-day extension. There is no rational basis for excluding dentists from the extension. For the trial court to interpret the statute as it did made the statute read unconstitutionally as treating dissimilarly members of the same class, i.e., persons holding claims against medical-physiological treatment professionals. This violates the Equal Protection Clause of the Ohio Constitution. (FN3) We find that there is no rational basis to make distinctions among those persons, and we

further do not find that the legislature intended to do so.

We hold that dental claims are subject to the 180-day extension period in R.C. 2305.11(A) because there is no rational basis for excluding them and the legislature did not intend to exclude them. (FN4) Therefore, appellant's lawsuit was timely filed.

This case came on appeal from summary judgment. In reviewing a summary judgment, the trial court and appellate courts use the same standard, that the inferences to be drawn from the underlying facts "must be viewed in the light most favorable to the party opposing the motion, and if when so reviewed reasonable minds can come to differing conclusions the motion should be overruled." Hounshell v. American States Insurance Co. (1981), 67 Ohio St. 2d 427, 433, 424 N.E. 2d 311, 315; see also Poller

v. Columbia Broadcasting System, Inc. (1962), 368 U.S. 464, 82 S. Ct. 486. The reviewing court must follow the standard set forth in Civ. R. 56 (C), which specifically provides that before summary judgment may be granted, it must be determined that:

(1) No genuine issue as to any material fact remains to be litigated.

(2) The moving party is entitled to judgment as a matter of law; and,

(3) It appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267, 274. Based on our decision, the appellees are not entitled to judgment as a matter of law. The

trial court improperly granted appellees' motion for summary judgment.

The judgment of the Court of Common Pleas is, accordingly, reversed and this cause is remanded for further proceedings not inconsistent with this Opinion.

KLUSMEIER and HILDEBRANDT, JJ., concur.

STAMPED FILED MAY 9, 1986, COLUMBIANA COUNTY COMMON PLEAS COURT, CARL L. STACEY, CLERK

STATE OF OHIO, COLUMBIANA COUNTY, SS:

IN THE COURT OF COMMON PLEAS

CLARENCE E. SICKELSMITH, et al.) CASE NUMBER

PLAINTIFFS) 84-CIV-1061

VS.)

EDWARD S. TOOLIS, JR., D.D.S.) JUDGMENT

DEFENDANT) ENTRY

By agreement of the parties, this matter is submitted to arbitration under the provisions of O.R.C. Section 2711.21.

S/S J. WARREN BETTIS
JUDGE J. WARREN BETTIS

APPROVED BY: DATED: MAY 9, 1986

S/S J. MICHAEL KAPP
J. MICHAEL KAPP
KAPP LAW OFFICES
ATTORNEY FOR PLAINTIFF

S/S JERRY O. STEPHENS
JERRY O. STEPHENS
ROTH, STEPHENS, BLAIR & CO., L.P.A.
ATTORNEY FOR DEFENDANT